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IN THE
Supreme Court of the United States

OCTOBER TERM, 1964

No. _____

OTTO V. BURNETT,

Petitioner,

v.

THE NEW YORK CENTRAL
RAILROAD COMPANY,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT**

TO the Honorable Chief Justice and
the Associates Justices of the
Supreme Court of the United States:

Petitioner, Otto V. Burnett, prays that a Writ of Certiorari issue to review the order and judgment of the United States Court of Appeals for the Sixth Circuit entered in that court in the above entitled case, affirming the

judgment of the United States District Court for the Southern District of Ohio, Western Division, sitting at Cincinnati, Ohio.

OPINIONS BELOW

The opinion of the Court of Appeals, not as yet reported, is attached hereto as Appendix B. The memorandum opinion and order of the District Court, not reported, is attached hereto as Appendix A.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit sought to be reviewed was dated and entered on the 2nd day of June, 1964.

Jurisdiction to review said judgment by Writ of Certiorari is believed to be conferred on the Supreme Court by the provisions of Title 28, U. S. Code, Section 1254(1).

QUESTIONS PRESENTED

The question presented is whether the three-year period of limitation applicable to actions for damages under the Federal Employers' Liability Act (45 USC § 56) may be extended by the Ohio Savings Statute (O.R.C. 2305.19).

The lower federal courts in this case held that as the statute created the right and also prescribed the remedy, the limitation period so fixed was substantive in nature, and could not be extended.

It is the contention of petitioner that there is nothing in the language or history of the Federal Employers' Liability Act to indicate that a claim under the Act expires absolutely, for all purposes and under all circumstances, in three years. To the contrary, petitioner submits that the

limitation period thereunder is subject to be tolled by the same valid reasons applicable to any other tort action, including war, fraud, estoppel or state saving statutes.

There is no inherent magic in categorizing the limitation period under the Act as substantive or procedural in nature, so as to justify the federal courts giving effect to the Ohio Savings Statute as to common law causes of action (remedial statutes of limitations), but denying the effect of the same Ohio Savings Statute as to a statutory cause of action (substantive statutes of limitation).

The decision of the Court of Appeals in this cause, as well as those very old decisions of other circuits relied upon by that court, holding that the statutory limitation period created by the Federal Employers' Liability Act is substantive in nature, not subject to being extended for any reason, are in direct conflict with those later decisions of other Courts of Appeals. The best exemplification is the decision of the Fourth Circuit in *Scarborough v. Atlantic Coastline R. Co.*, 178 F. 2d 253, cert. denied, in 339 U. S. 919, holding that the FELA limitation period could be extended on account of fraud practiced on the plaintiff, and of the Eighth Circuit in *Kansas City, Missouri v. Federal Pacific Electric Co.*, 310 F. 2d 271 (1962), holding that the statutory limitation period created by the Clayton Act, 15 USCA § 15 b, is procedural in nature, subject to being tolled.

While this Court, in *Glus v. Brooklyn Eastern District Terminal*, 359 U. S. 231, established that the limitation period created under the Federal Employers' Liability Act is not inflexible, but can be tolled by the doctrine of equitable estoppel, the Court has not passed upon the more basic conflict which rages throughout lower courts, both state

and federal, i.e., the procedural-substantive dichotomy. It is earnestly submitted that a decision is urgently needed that the congressional intention, in enacting the three-year limitation period under the Federal Employers' Liability Act in particular, and other federally created rights in general, was simply to set up a uniform statute of limitations throughout the United States, and that such statutes of limitation are subject to being tolled in the same fashion and for the same reasons as any other statutes of limitation.

STATUTES INVOLVED

UNITED STATES

The first paragraph of Title 45, USC § 56, provides: "No actions shall be maintained under this act unless commenced within three years from the day the cause of action accrued."

OHIO

The Ohio Savings Statute is contained in O.R.C 2305-
"In an action commenced, or attempted to be commenced, if in due time a judgment for the plaintiff . . . fails otherwise than upon the merits, and the time limited for the commencement of such action at the date of . . . failure has expired, the plaintiff . . . may commence a new action within one year after such date."

STATEMENT OF CASE

Petitioner, a resident of Kentucky, an employee of respondent-railroad, was injured on March 17, 1960, in Indiana, while in the course of his employment. He commenced an action under the Federal Employers' Liability

Act, 45 USC § 51, et. seq., in the Common Pleas Court of Hamilton County, Ohio, on March 13, 1963. Upon respondent's motion directed to improper venue, petitioner was non-suited in the Ohio court on June 4, 1963.

On June 12, 1963, petitioner refiled this action in the United States District Court for the Southern District of Ohio, relying upon the Ohio Savings Statute, O.R.C. 2305.19. Respondent filed its Motion to Dismiss, alleging that the Complaint had not been filed in the District Court within the three-year limitation period applicable to FELA actions, 45 USC § 56, and that the Ohio Saving Statute was inapplicable; the District Court sustained said Motion, and ordered the action dismissed (Appendix A). Upon appeal to the Court of Appeals for the Sixth Circuit, the dismissal was affirmed, the court holding that the limitation period was more than procedural, that it was a matter of substance, that failure to bring the action within the time prescribed extinguished the cause of action and that such time could not be extended by the state saving statute. (Appendix B)

HOW FEDERAL QUESTION IS PRESENTED

The federal question was presented at the outset, the Complaint alleging a cause of action under the Federal Employers' Liability Act, 45 USC § 51, et. seq. The decisions of both federal courts were based upon the older, narrow, ritualistic interpretation of the limitation period under said Act, 45 USC § 56.

Petitioner submits that the sole question before this Court is the correct interpretation to be accorded this limitation statute.

REASONS FOR GRANTING THE WRIT

The decisions of both the Court of Appeals and the District Court in the instant case were based upon the rule that the cause of action under the FELA was created by statute, that this statute also created the remedy; therefore the limitation period prescribed therein was substantive in nature, and could not be extended.

Petitioner has conceded that prior to 1947, this was the rule.

However, since 1947, courts throughout the United States have reexamined the reasons behind this rule, and have concluded that such holdings were mere semantic distinctions unsupported by reason, and were harsh and unjust. Such courts have in fact largely emasculated the rule by engrafting a growing list of exceptions thereto, based upon various equitable principles.

In the FELA field, we find the decisions of *Osbourne v. United States*, 164 F. 2d 767 (1947), CA-2, *Frabutt v. New York, C. & St. L. R. Co.*, 84 F. Supp. 460 (W.D. Pa., 1949), *Scarborough v. Atlantic Coast Line R. Co.*, 178 F. 2d 253, CA-4, cert. denied 339 U. S. 919, 190 F. 2d 935, 202 F. 2d 84; *Fravel v. Pennsylvania R. Co.*, 104 F. Supp. 84 (D. Md.); and *Toran v. New York, N. H. & H. R. Co.*, 108 F. Supp. 564 (D. Mass.), where the Courts have held that the limitation period could be tolled because of war, or on account of fraud practiced on the plaintiff.

The rationale opposing the artificial and mechanistic treatment of these cases was best stated in the *Scarborough* case, supra:

"The decisions in the *Osbourne* and *Frabutt* cases show clearly that there is a chink in the supposedly impregnable armor of the substantive time limitation

of the Act. If, as those cases decided, there is one exception (war), surely the infinite variety of human experience will disclose others. Those cases demonstrate that a claim under the Act is not a legal child born with a life span of three years, whose life must then expire, absolutely, for all purposes and under all circumstances."

This court recognized the sharp conflict between the pre-1947 and post-1947 cases in *Glus v. Brooklyn Eastern District Terminal*, 359 U. S. 231, and held that the limitation period under the FELA could be extended by the doctrine of equitable estoppel based on fraud.

Every court which has critically reexamined this rule since 1947 has found a basis for extending the particular statutory limitation period. The cases have followed two broad avenues to reach the same result.

In the cases which have considered the FELA limitation period, the courts have discussed the substantive-procedural dichotomy, but none has made the flat assertion that the limitation statute, 45 USC § 56, was solely procedural in nature. Rather, in each case the exception was based upon equitable considerations which these courts held were so basic as to be applicable to both procedural and substantive limitation statutes.

In contrast to this form of analysis of the FELA limitation, the federal courts, of late, in interpreting the parallel limitation statute under the Clayton Act; 15 U. S. C. § 15 b, have flatly asserted that it is procedural in nature, and therefor subject to being extended. As stated in *Kansas City, Missouri v. Federal Pacific Electric Co.*, 310 F. 2d 271 (CA-8, 1962):

"While we believe that the controlling factor in determining whether the statute should be tolled for

fraudulent concealment is congressional intent, irrespective of the doubtful procedural-substantive dichotomy, if such a classification is significant, it is our view that the evidence supports plaintiff's contention that § 4 B. is procedural."

In like vein are the cases of *Public Service Co. of New Mexico v. General Electric Co.*, 315 F. 2d 306 (CA-10, 1963) and *Westinghouse Electric Corp. v. Pacific Gas & Electric Co.*, 326 F. 2d 575 (CA-9, 1964).

Petitioner recognizes that all of the post-1947 era cases cited above, as examples of the revolution which has taken place in extending the hitherto restrictive limitations under statutory causes of action, have involved fact situations in which plaintiff found himself in the predicament of being unable to commence his action within the statutory period because of circumstances beyond his own control, the most frequent example being fraudulent concealment. In such extreme circumstances, the courts have felt it necessary to utilize equitable principles to avoid the harsh result inherent in a too-literal interpretation of the particular limitation statute.

The Court of Appeals, in the instant case, noting this thread running through these cases, sought to distinguish petitioner's plight on the ground that he had placed himself in his predicament by his own act in choosing the wrong forum in which to initiate his suit; that such a circumstance did not call forth the same need for equitable intervention by the court as did facts based on fraud.

The fundamental error in this analysis is that the Court overlooked the fact that savings statutes of the type involved in this action were originally enacted in the various states, and thereafter applied as part of the procedural law

by the federal courts, in order to satisfy the same basic need for equitable intervention as existed in the case of fraud.

This Court has recognized the common equitable background of the two situations. In discussing the legislative history of the removal statute, 28 U. S. C. § 1406 (a), which prevents, as between federal courts, the same injustice as savings statutes do, as between state courts, this Court, in *Goldlawr v. Heiman*, 369 U. S. 463 (1962), held:

"The problem which gave rise to the enactment of the section was that of avoiding the injustice which had often resulted to plaintiffs from dismissal of their actions merely because they had made an erroneous guess with regard to the existence of some elusive fact of the kind upon which venue provisions often turn. . . .

"When a lawsuit is filed, that filing shows a desire on the part of the plaintiff to begin his case and thereby toll whatever statutes of limitation would otherwise apply. The filing itself shows the proper diligence on the part of the plaintiff which such statutes of limitation were intended to insure. If by reason of the uncertainties of proper venue a mistake is made, Congress, by the enactment of § 1406 (a), recognized that 'the interest of justice' may require that the complaint not be dismissed but rather that it be transferred in order that the plaintiff not be penalized by what the late Judge Parker aptly characterized as 'time-consuming and justice-defeating technicalities'."

Justice Cardozo, while on the New York bench, made similar observations regarding the savings statutes in *Gaines v. City of New York*, (1915), 215 N. Y. 533, 109 N. E. 594 at page 596.

It is petitioner's contention that it is logically unsound to permit, as did the Court of Appeals, the FELA limitation

statute, 45 USC § 56, to be tolled by reason of war, fraud, fraudulent concealment or estoppel, but to balk at recognition of the next logical and necessary step, to-wit: that these same equitable principles demand that such limitation period also be tolled by a saving statute.

This Court's decision in *Glus v. Brooklyn Eastern District Terminal*, 359 U.S. 231, might have been more fortunate if it had cut through the profitless semantics of the substantive-procedural debate entirely—as did the Federal cases cited above, or, failing that, at least have clearly stated beyond doubt or quibble, that the limitation statute involved was procedural in nature, and subject to being tolled by the same equitable factors as any other remedial statute. The failure to do so has resulted in the lower federal and state courts being left to their own devices in interpreting the extent of the applicability of the *Glus* case.

On the one hand we find the Court of Appeals of Tennessee, in *Breneman v. C. N. O. & T. P. Ry. Co.*, 346 S. W. 2d 273 (1961), in a fact situation closely analogous to the instant case, holding that the FELA limitation period was tolled by the Tennessee Saving Statute, T.C.A. § 28-106, which is comparable to Ohio Revised Code § 2305.19, and basing their decision on the proposition:

“Although there is a conflict in the Federal cases, we think *Glus v. Brooklyn Eastern District Terminal*, 359 U. S. 231 has effected a change in the rule of earlier cases.”

and concluding:

“We are not unmindful that the saving statute, T.C.A. § 28-106 applies only to a statute of limitations which relates to the remedy. *Automobile Sales Co. v.*

Johnson, 174 Tenn. 38, 122 S.W. 2d 453, 120 A.L.R. 370. As we have seen, however, under the Federal law the distinction has been abolished and is no longer recognized with respect to actions under the Federal Employers' Liability Act. The limitation being procedural only a new action may be instituted within one year after a voluntary dismissal."

We also find the Ninth Circuit, in *Westinghouse Electric Corp. v. Pacific Gas & Electric Co.*, 326 F. 2d 575 (1964), holding:

"Many of the cases supporting appellant's contention do so by way of dicta. See *Glus v. Brooklyn Eastern Terminal*, 359 U.S. p. 234, 79 S. Ct. p. 762, 3 L. Ed. 2d 770. We believe, where circumstances dictate, the trend is toward applying the fraudulent concealment exception to all statutes of limitation, be they limitations on the right itself or merely on the remedy."

At the same time, we find the Court of Appeals, in the instant case, stating:

"We find nothing in *Glus* indicating that the Supreme Court has overruled previous cases holding that the limitation in the Act was substantive and not procedural. In our judgment, cases involving fraud are inopposite. We prefer to follow the decisions in *Bell*, *Gibson Lumber Co.* and *Cotton*, supra, which are precisely in point.

"We are not prepared to extend the rule in *Glus* to the facts of the present case."

A decision by this Court that statutes of limitation, be they limitations on the right itself or merely on the remedy, are subject to the very same exceptions, and specifically,

that the Federal Employers' Liability Act limitation period can be tolled by an appropriate state savings statute, would be in accord with the reasoning of prior decisions of this Court, and would remove the distressing uncertainties and conflicts into which lower courts have fallen.

CONCLUSION

Petitioner submits that the limitation statute under the Federal Employers' Liability Act, 45 USC § 56, has never been interpreted by this Court as being substantive in nature, not subject to extension by an applicable state saving statute. On the contrary, the logical extension of the rule of *Glus v. Brooklyn Eastern District Terminal*, 359 U.S. 231, allows no other conclusion but that such statute may be so tolled.

Because the United States Court of Appeals for the Sixth Circuit erroneously considered that it was not bound to follow the rule of the *Glus* case, the petition for a writ of certiorari should be granted, and the United States Court of Appeals for the Sixth Circuit reversed.

Respectfully submitted,

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APPENDIX A**MEMORANDUM OPINION AND ORDER**

(Filed October 4, 1963)

The question presented by defendant's motion for dismissal is whether the saving clause of a state statute can be applied so as to extend the period within which an action must be commenced under the Federal Employers' Liability Act (45 U.S.C., Sections 51, et seq.). Alleging facts describing a situation covered by the Act, plaintiff filed his petition in the state court within three days of the expiration of the 3-year limitation period provided in 45 U.S.C., Section 56. After being non-suited by ruling on defendant's motion directed to venue, plaintiff, within one year brought action in this court. He resists the present motion on the ground that the savings clause in Section 2305.19, Ohio Revised Code, has application since the state court action failed otherwise than upon the merits and he refiled within the year.

Except for a state court decision hereinafter mentioned, counsel agree that there is no decision directly in point. It is, however, plaintiff's contention that the "trend" of the federal court decisions points to the allowance of commencement of action within the savings clause provision. The "trend" is said to have originated in *Osbourne v. United States*, 164 F. 2d 767 (2d Cir. 1947), where the period of limitation was extended because plaintiff was a prisoner of war, and carried further in *Frabutt v. New York, Chicago & St. Louis R. Co.*, 84 F. Supp. 460 (W. D. Pa. 1949), where an injured party was a non-resident alien residing in a country with which United States was at war. *Scarborough v. Atlantic Coast Line R. Co.*, 178 F. 2d 253

(4th Cir. 1949), cert. den. 339 U. S. 919 (1950), went a short step further and held that the defendant was estopped from asserting the limitation defense because of fraud. Of similar effect is *Glus v. Brooklyn Eastern District Terminal*, 359 U. S. 231 (1959). It will be noted that in these cases delay was occasioned either by factors beyond the control of the parties (prisoner of war, existence of state of war), or by the conduct of the defendant (fraud). An entirely different situation presently prevails, since the choice of time and place of filing was in the exclusive control of the plaintiff.

Whether plaintiff could have maintained a tort action under the law of Ohio does not conclusively appear, but such an action would clearly have been barred by the state's 2-year statute of limitations (Ohio Revised Code, Section 2305.10). Either for the purpose of avoiding that limitation or for other reasons plaintiff brought his suit under the FELA and gained among other advantages that of the 3-year period. Having possessed himself of that advantage, plaintiff now seeks the refuge of the Ohio savings clause. However, in our opinion, he is precluded from doing so. Since asserting a right created by the Act, he must comply with its integral and substantive provisions. The limitation provision being substantive in nature, it cannot be extended by the savings clause of the Ohio statute.

The state court case in point to which earlier reference was made in *Breneman v. Cincinnati, New Orleans and Texas Pacific Railway Company*, 48 Tenn. App. 299, 346 S. W. 2d 273 (1961), wherein a conclusion is expressed as to the present state of the federal law which is not supported by presently existing decisions. While the per-

suasiveness of the Tennessee opinion is recognized, as is the sympathetic aspect of the present plaintiff's situation, lest a hard case make bad law it is here held that the Ohio savings clause is without application. Additionally, justification does not appear for extending a barely discernible "trend" to reach a conclusion which is admittedly contrary to existing law. Accordingly,

IT IS ORDERED that the defendant's motion to dismiss this action because the complaint fails to state a claim against this defendant upon which relief may be granted should be and it is hereby sustained and said action is dismissed at plaintiff's costs, with notation of plaintiff's exceptions.

/s/ JOHN W. PECK
District Judge

APPENDIX B

No. 15627

UNITED STATES COURT OF APPEALS

(For the Sixth Circuit)

OTTO V. BURNETT,

Plaintiff-Appellant

v.

THE NEW YORK CENTRAL

RAILROAD COMPANY,

Defendant-Appellee

**APPEAL from the United States District Court
for the Southern District of Ohio, Western Division.**

Decided June 2, 1964

**Before: WEICK, Chief Judge, O'SULLIVAN and PHILLIPS,
Circuit Judges.**

WEICK, Chief Judge. The question in this appeal is whether the three year period of limitation within which actions for damages under the Federal Employers' Lia-

bility Act (45 U. S. C. § 56¹) must be brought, may be extended by the Ohio Savings Statute.²

Plaintiff, a resident of Kentucky and an employee of the railroad, was injured on March 17, 1960, in the course of his employment in the state of Indiana. He filed suit under the Act in the Common Pleas Court of Hamilton County, Ohio, on March 15, 1963, just a few days before the statute had run. The action in the state court was dismissed on June 4, 1963 because of improper venue. On June 12, 1963 plaintiff instituted the present action in the United States District Court for the Southern District of Ohio. The District Court sustained defendant's motion to dismiss on the ground that the action was barred by the three-year limitation in the Act.

The limitation provided in the Act contains no exceptions. Plaintiff seeks to engraft the Ohio Savings Statute on the Act as an exception.

The Ohio Savings Statute is in the chapter of the Ohio Code dealing with limitation of actions. In this chapter there is a specific limitation for actions for bodily injury or for injury to personal property. R.C. § 2305.10 provides:

"An action for bodily injury or injuring personal property shall be brought within two years after the cause thereof arose."

If the Ohio statute of limitations had been applicable, the first action commenced in the Common Pleas Court would

¹ 45 U.S.C. § 56:

"No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued."

² Ohio Rev. Code § 2305.19 provides:

"In an action commenced, or attempted to be commenced, . . . if the plaintiff fails otherwise than upon the merits, and the time limited for the commencement of such action at the date of reversal or failure has expired, the plaintiff . . . may commence a new action within one year after such date. This provision applies to any claim asserted in any pleading by a defendant. . . ."

have been barred since it was not filed within two years from the date of the accident.

In the absence of a Federal statute of limitations, the state statute of limitations would control. *Holmberg v. Armbrrecht*, 327 U. S. 392; *Englander Motors, Inc. v. Ford Motor Co.*, 293 F. 2d 802, 804 (CA 6). In such a situation the period of limitation would not have been uniform throughout the country, but would have varied depending upon the particular statute of each state. If plaintiff had filed the present action in a state which had no Savings Statute, there would be no question about his claim being barred.

The undoubted purpose of Congress in enacting the three-year limitation in the Act was to bring about uniformity of application. The limitation in the Federal statute controls over an inconsistent state statute. *Atlantic Coast Line R. v. Burnette*, 289 U. S. 199, 200; 34 Am. Jur., Limitation of Actions, § 53, pp. 51, 52.

But the limitation in the Act is more than merely procedural. It is contained in an Act which created a new right and prescribed the remedy. The remedy is a part of the right and is a matter of substance. Failure to bring the action within the time prescribed extinguished the cause of action. *Central Vermont Ry. v. White*, 238 U. S. 507; *Harrisburg v. Richards*, 119 U. S. 199, 214; *Bell v. Wabash Ry. Co.*, 58 F.2d, 569 (CA 8); *American R. Co. of Puerto Rico v. Coronas*, 230 Fed. 545 (CA 1); 35 Am. Jur., Master and Servant, § 469, p. 885.

The State Savings Statute was not applicable. *Bell v. Wabash Ry. Co.*, supra; *United States for the use of Gibson Lumber Co. v. Boomer*, 183 Fed. 726, 730 (CA 8); *Cotton v. Wabash R. Co.*, 198 Iowa 535, 36 A.L.R. 913.

Appellant concedes that —

“... during the period 1910-1947 American Courts uniformly held that statutory actions generally, and the FELA (45 U.S.C.A. § 56) in particular, could not be tolled after the manner of remedial statutes of limitation, for any reason, even for fraud or concealment.”

He states:

“It is from this period of American jurisprudence that the trial court abstracted the rule applied to this case.” (Appellant's brief, p. 3)

Appellant contends that since 1947 Courts have applied exceptions to the rule and one should be applied here. He relies on the following cases: *Osbourne v. United States*, 164 F.2d 767 (CA 2), where a limitation was tolled because the litigant was a prisoner of war; *Fraubutt v. New York, C. & St.L.R.Co.*, 84 F.Supp. 460 (W.D., Pa.), where the limitation was extended as between citizens of countries at war; *Scarborough v. Atlantic Coast Line R. Co.*, 178 F.2d 253 (CA 4), cert. denied 339 U. S. 919, and subsequent decisions reported in 190 F.2d 935 and 202 F.2d 84; *Fravel v. Pennsylvania R. Co.*, 104 F.Supp. 84 (D., Md.); *Toran v. New York, N.H. & H.R.Co.*, 108 F.Supp. 564 (D., Mass.), where the Courts applied the doctrine of estoppel to toll the statute on account of fraud practiced on the plaintiff by the prevailing party.

The Supreme Court in *Glus v. Brooklyn Eastern Dist. Terminal*, 359 U. S. 231, and this Court in *Louisville & Nashville R. Co. v. Disspain*, 275 F.2d 25 (CA 6), applied the same principle in tolling the limitation in the Act because of fraud.³

³There is a conflict of authority on whether a substantive statute of limitation may be tolled because of fraudulent concealment. 15 A.L.R.2d 500, 502.

In *Glus*, the Court said: "To decide the case we need look no further than the maxim that no man may take advantage of his own wrong." (359 U. S. at 232).

In *Osbourne* and *Frabutt* the litigants were relieved of the consequences of the Act because of circumstances beyond their control, namely, prisoner of war, and war.

The closest case cited by appellant was *Breneman v. Cincinnati, New Orleans & Texas Pacific Railway Co.*, 346 S.W.2d 273 (Tenn. App.), where plaintiff in an FELA case had been non-suited in the District Court and brought a second suit in the state court in Tennessee within the period permitted by a state statute (T.C.A. § 28-106) somewhat comparable to the Ohio Savings Statute. The Tennessee Court was of the view that although there was a conflict in the Federal cases, "*Glus* has effected a change in the rule of the earlier cases." We agree that the rule may have been changed with respect to cases involving fraud. In *Breneman*, the railroad physician had misadvised plaintiff concerning his injury.

We find nothing in *Glus* indicating that the Supreme Court has overruled previous cases holding that the limitation in the Act was substantive and not procedural. In our judgment, cases involving fraud are inapposite. We prefer to follow the decisions in *Bell*, *Gibson Lumber Co.* and *Cotton*, supra, which are precisely in point.

The predicament in which plaintiff finds himself was caused not by fraud but by his own act or failure to act. We are not prepared to extend the rule in *Glus* to the facts of the present case.

The judgment of the District Court is affirmed.